IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY (a corporation), *Appellant,* vs. EBNER GOLD MINING COMPANY (a corporation), THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), ANGUS MACKAY, as receiver for THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), and DOWNIE D. MUIR, *Appellees.*	No. 2795

REPLY OF APPELLEE, EBNER GOLD MINING COMPANY, TO APPELLANT'S PETITION FOR A REHEARING.

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Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In its opening brief appellant urged that certain findings, upon which the decree of the trial court rests, are unsupported by the evidence; and it pointed out wherein, it conceived, the evidence is insufficient. Appellee, Ebner Gold Mining Company, in its brief, discussed this evidence, at considerable length, and showed that it is entirely ample to support these findings. Full oral argument was had before the Court. Upon this argument and the briefs and, as appears from the opin-

ion filed, from a careful examination of the evidence in the record, this Court determined that the findings, upon which the decree is based, are well supported by the evidence and that the record is otherwise free from error.

Appellant's "Petition for Rehearing" is devoted mainly to an argument upon the sufficiency of the evidence to support the same findings as were attacked by it in its opening brief and at the oral argument. But this Court, after a careful review of the whole case, has determined and declared that the evidence is sufficient to support the findings; especially, in view of the fact that the burden of proof was upon the appellant, which instituted the suit.

The petition of appellant for a rehearing is, in effect, an attempt to convince this Court that there was evidence in conflict with that, which this Court holds is sufficient to support the findings. But, plainly, inasmuch as this Court has determined that there was evidence sufficient to support the findings, the fact, that there may be other evidence which does not sustain them, cannot afford any reason for the further consideration of the case, in view of the settled rule, adverted to in the opinion, that whenever a finding is based upon conflicting evidence, this Court is not "at liberty to disregard it if we were of the opinion that it was contrary to the weight of evidence".

Under these circumstances, we deem it unnecessary to make any answer to the argument in appellant's petition upon the weight of the evidence, further than to refer to the views of the evidence contained in this

Court's opinion, and to the discussion thereof in the brief of appellee.

Besides its argument on the evidence, appellant advances certain propositions which, it claims, furnish reasons why appellee is not entitled to prevail. We will briefly consider these propositions.

I.

THE TRIPP NOTICE WAS THE NOTICE OF APPELLEE.

As stated in the opinion, a majority stockholder is the actual trustee for the corporation; and, applying this principle, this Court holds that anything that Tripp, the agent for the majority stockholders, did for the benefit of the properties, owned by the corporation, inured to the benefit of the corporation.

This ruling is challenged by appellant by an assertion that a majority stockholder cannot direct the business affairs of a corporation and that, assuming that a majority stockholder is the agent of the corporation, that agent has no power to delegate his authority.

This suggestion of appellant is based upon a failure to distinguish between trusteeship and agency. True, a majority stockholder is not the agent of the corporation with power to direct its affairs; but, this does not prevent the majority stockholder from bearing a fiduciary relation to the corporation, in consequence of which anything done by him, for the benefit of the corporate property, is conclusively presumed to have been

done for the benefit of the corporation; whether it is done by the majority stockholder himself or by his agent.

II.

ALTHOUGH THE TRIPP NOTICE WAS POSTED ON THE EBNER PROPERTY, NO ONE GOING UPON THE PROPERTY FOR THE PURPOSE OF READING THE NOTICE WOULD BE A TRESPASSER.

The suggestion of appellant, that because the Tripp notice was posted on the Ebner property, it could furnish no basis for a right to the water, for the reason that anyone going upon the property to read the notice would be a trespasser, merits, we think, no serious consideration; for, of course, when a notice of appropriation is posted on one's own land it is, in effect, an implied invitation to anyone to come upon that land for the purpose of reading the notice; and, anyone so going upon the land to read such a notice is clearly not committing a trespass.

III.

IRRESPECTIVE OF THE TRIPP NOTICE, APPELLEE, HAVING FIRST COMMENCED THE WORK, IS ENTITLED TO PRIORITY.

Much is said in the petition with reference to the effect of the Tripp notice as giving notice to appellant; and appellant argues that, irrespective of the notice, the rights of the parties are to be governed, solely, by the priority of the work done in aid of the appropria-

tions. The validity of the Tripp notice and its effect in giving appellee priority are fully discussed in our brief herein; but, aside from this, under appellant's own view, appellee is entitled to priority because, as the trial court found and as this Court held, in accordance with the evidence,

> "not until after the appellee had followed up the posting of the Tripp notice by actual physical work at the point where the notice was posted, and after the actual diversion of water at that point, did the appellant do anything that would give notice to the appellee that the appellant intended to make any claim to the water of the creek, or appropriate the same".

IV.

THE POSTING OF APPELLANT'S NOTICE ON APPELLEE'S PROPERTY AND THE WORK DONE THEREON WERE TRESPASSES AND NO RIGHTS COULD BE INITIATED THEREUNDER.

In its opinion this Court refers to, and applies, the settled doctrine

> "that the right of appropriation extends only to waters upon the public domain of the United States, or upon the public lands of a state, for one cannot acquire a water right on land held in private ownership by another without acquiring an easement in such land."

and cites several cases sustaining this doctrine.

As being inconsistent with this doctrine, appellant cites *Boquillas Land and Cattle Co. v. Curtis,* 213 U. S. 339, and *State v. Superior Court,* 126 Pac. 945. Neither

of the cases cited militates in the slightest against the principle applied by this Court.

In the *Boquillas* case, was involved the application of a statute of Arizona, which provided that

> "All the inhabitants of this Territory who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same *from any convenient river, creek or stream of running water.*"

The court held that, under this statute, the water could be appropriated "*from any convenient river,* creek or stream of running water", although such running water was situated on land of another; damages being allowed by the statute for injury done to such other's land.

In *State v. Superior Court,* the court concluded that a certain special statute

> "confers upon landowners nothing more than an equal right of appropriation with others, regardless of their land bordering upon the shore line";

and that, therefore, water could be appropriated upon the land of another.

There is no similar statute applicable to Alaska. The statement of appellant, that the statute involved in the *Boquillas* case is similar in effect to the ninth section of the Act of 1866, in force in Alaska, is based upon a misconception of the terms of the provision of the Alaska statute. That statute provides, solely, that rights to the use of water, which have vested and accrued, shall be maintained; and that rights of way for

the construction of ditches and canals shall be confirmed; with the proviso that, any person who shall, after the passage of the act, in constructing any ditch or canal, injure or damage the possession of any settler on the public domain, shall be liable to damages therefor. This section thus wholly fails to grant any right to appropriate water on lands of another; it simply deals with the rights of one, who has effected an appropriation, to construct ditches for carrying the water.

It is respectfully submitted that the decision of this Court, as expressed in its opinion, is plainly right; that appellant, in its petition for rehearing has shown no particular wherein the Court's opinion is erroneous, or any reason why the case should receive further consideration, and that the petition should, therefore, be denied.

Dated, San Francisco,
April 11, 1917.

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